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No. 99-1328

IN THE
SUPREME COURT OF THE UNITED STATES

DiMa Corp.,

Petitioner,

vs.

The Town of Hallie
Wisconsin,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This brief is submitted pursuant to the provisions of Rule 15.8 of the Rules of the Supreme Court of the United States, this being a brief calling attention to new cases or other intervening matter not available at the time of the party's last filing. In particular, this brief is submitted as a result of the decision of this Court in *City of Erie v. Pap's A.M.*, 529 U.S. ___(March 29, 2000).

ARGUMENT

I. THE *PAP'S* DECISION PRODUCED NO OPINION OF THIS COURT.

The most obvious feature of this Court's decision in *City of Erie v. Pap's A.M.*, supra, is not only did the opinion not produce a single majority opinion; it did not even produce a plurality or concurring opinion which could be considered an opinion of the Court set forth by this Court in *Marks v. United States*, 430 U.S. 188 (1977), in which this Court suggested that where no single opinion obtains a majority vote, but where there is an opinion concurring in the judgment on sufficiently narrow grounds that it would necessarily be endorsed by at least five justices, that opinion will constitute the opinion of the Court.

No such opinion appears as a result of the *Pap's* case. Indeed, there appears to be only two points upon which a

majority of justices in the instant case agreed:

(1) That the City of Erie's petition for writ of certiorari should not be dismissed as moot, notwithstanding the closure of Respondent's business.[1]

(2) That the ordinance in question, prohibiting total nudity in dance performances, could not be justified on the basis of preventing adverse secondary effects.[2]

1Part II of the O'Connor opinion, joined in by Chief Justice Rehnquist, and associate justices Kennedy, Breyer, and Souter, plainly commanded a majority of the Court.

2The five Justices joining in this opinion are as follows, Justice Stevens, with whom Justice Ginsburg joins, dissenting, stating, "To believe that the mandatory addition of pasties and a G-string will have any (emphasis by Justice Stevens) kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible"(Id. at___slip opinion at P. 7, Stevens J. dissenting); dissenting opinion of Justice Souter: "It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude" (Id. at___slip opinion at p. 4, n. 3, Souter J. concurring and dissenting); and the concurring opinion of Justice Scalia, joined in by Justice Thomas: "I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease (Id. at ___slip opinion at p. 10, Scalia J. concurring)."

Apart from these two positions, no five justices in *Pap's* relied upon any proposition which could remotely be considered an opinion of the court under the *Marks* test. Certainly, the opinion of the Court cannot be considered the O'Connor plurality opinion, holding that the prohibition of nudity could be justified as a method of preventing adverse secondary effects, since, as already noted, supra, a five-justice majority specifically rejected the proposition that the regulation would have any effect whatsoever on reducing adverse secondary effects. Certainly, the opinion of the Court cannot be the Scalia concurrence, since the holding of that opinion, to-wit: that the lawsuit had been rendered moot was also specifically rejected by a majority of the justices. The Scalia opinion, to the extent that it upholds the ordinance based upon the proposition that nude dancing itself is inherently immoral, also plainly fails the *Marks* test for at least two reasons: First of all, since, as the Scalia opinion persuasively argues, the case should have been dismissed as moot, such mootness would deprive the Court of jurisdiction to consider merits of the claim, thus rendering any opinion on the merits mere obiter dicta. Compare *Richardson v. Ramirez*, 418 U.S. 24 (1974). Secondly, even if the comments of the Scalia concurrence were not pure dicta, the notion that government may ban expressive conduct it considers

immoral is certainly a holding much broader in scope than is government's ability to ban expressive conduct which causes adverse secondary effects, thus precluding the Scalia opinion from being the holding of the Court under the *Marks* test. Finally, the dissenting opinions, having been rejected by at least six justices, cannot be considered the holding of the Court.

II. A MAJORITY OF THIS COURT IN *PAP'S* CLEARLY REJECTED THE SEVENTH CIRCUIT'S "OBJECTIVE TRUTH IS IRRELEVANT" STANDARD.

Notwithstanding the absolute failure of five justices of this Court in *Pap's* to agree on much of anything, it is clear that a majority of this Court plainly rejected the Seventh Circuit's analysis that "objective truth" as to whether Petitioner's uses cause adverse secondary effects which would justify an hours of operation restriction was irrelevant. The O'Connor concurring opinion in *Pap's* made it clear that the plurality of this Court accepted the city's "secondary effects" justification of the anti-nudity ordinance only because it was not contested by the Respondent in that case. Justice O'Connor wrote, in part IV of her opinion:

> "Here, Kandyland has had ample opportunity to contest the Council's findings about secondary effects - before the Council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged

> the City Council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the Council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited (emphasis supplied)." Id.at 17.[3]

Justice O'Connor proceeds to reject Justice Souter's concurring opinion, which would have demanded a much stronger evidentiary basis for the Council's conclusion with respect to adverse secondary effects, stating the following:

> "Justice next hypothesizes that the reason we cannot accept Erie's conclusion is that, since the question whether these secondary effects occur is 'amenable to empirical treatment,' we should ignore Erie's actual experience and instead require such an empirical analysis. [Citation omitted.] In *Nixon* [v. *Shrink Missouri Government PAC*, 528 U.S. ___ (January 24, 2000)], however, we flatly rejected that idea. [Citation omitted.] (Noting that the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government)." Id. at 19.

3The so-called "expert judgment" consisted of the City Council members' "first-hand knowledge of what took place at and around nude dancing establishments in Erie," enabling such members to make "particularized expert judgments about the resulting harmful secondary effects." Id. at 16.

The reference to the *Nixon* case was to in this Court's decision upholding the validity of the Missouri legislature's limitation on the amount of contributions to candidates for state office. At issue was whether a sufficient evidentiary basis existed to support the purported need for such a restriction, based upon the justifications of prevention of corruption and government and public perception of corruption in government. The Court then proceeded to outline the evidentiary record made in the trial court to support the conclusion that both interests would be furthered by the legislation in question. This Court, by Justice Souter then concluded as follows:

> "There might, of course, be need for a more extensive evidentiary documentation if Petitioner's had made any showing on their own to case doubt on the apparent implication of *Buckley' s* and the record here (emphasis supplied)., but the closest Respondents come to challenging these conclusions is their invocation of academic studies said to indicate that large contributions to public officials or candidates do not actual result in changes in the candidates' position. Brief for Respondent's Shrink Missouri Government PAC, et al 41; Smith, Money Talks; Speech, Corruption, Equality and Campaign Finance, 86 Geo. L.J. 45, 58 (1997); Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 Yale L. J. 1049, 1067-1068 (1995). Other studies, however, point the other way. Reply

> Brief for Respondent Bray 4-5; F. Sorauf, Inside Campaign Finance 169 (1992); Hall & Wayman, Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees, 84 a.m. Pol. Sci. Rev. 797 (1990); D. Magleby & C. Nelson, The Money Chase 78 (1990). Given the conflict among these publications, and the absence of any reason to think that public perception has been influenced by the studies cited by Respondents, there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." Id. at ___, slip opinion at p. 7.

Thus, it is clear from both the O'Connor concurrence in *Pap's* and the majority opinion of this Court in *Nixon*, written by Justice Souter, that this Court has adopted the following standards with respect to evidentiary burdens to justify restrictions on First Amendments rights:

1. Automatic deference to governmental conclusions occurs only when those conclusions are not challenged by the proponents of First Amendment rights.

2. Where such a challenge occurs, and the evidence is contradictory, or does not necessarily dispute the government's conclusion deference will occur in those cases as well.

3. Where there is a conflict between the city's own experience and academic studies, the city's own experience prevails.

4. Apart from the foregoing situations, objective truth plainly does make a difference.

Judged by these standards, the inadequacy of Respondent's showing in the instant case is obvious.

To begin with, the undisputed record in the instant case is not that the city's own experience has been that adult entertainment causes adverse secondary effects; quite to the contrary, the unrefuted record indicates that the town's experience has been absolutely to the contrary. As noted in the original petition, an objective study of the police calls to both the Pure Pleasure adult bookstore to a 24-hour restaurant, and 24-hour convenience stores indicates that police calls to the adult bookstore have been substantially fewer than to the 24-hour restaurant, and no greater than the calls to the convenience store (appendix at A.92-A.102.).

Moreover, in an uncontradicted affidavit, a clerk of the Pure Pleasure store indicates that he was advised by a Hallie Police Officer that the Hallie police were grateful that the store was open 24 hours per day, in that its being open was a

different to crime (Appendix at A.108).[4]

Finally, it should be noted that Petitioner offered expert testimony indicating that the only study ever done by a governmental agency attempting to correlate law enforcement problems and late night operations of adult entertainment establishments concluded that adult entertainment no more law enforcement problems than do other establishments open during late night hours.[5]

Plainly, given the fact the town's conclusions of adverse' secondary effects were directly challenged, not only by academic studies, but by the town's "own experience," and that the evidence in that regard was essentially uncontradicted, this case plainly falls outside the deference to governmental judgment, recognized in *Pap's* and *Nixon*.

CONCLUSION

4The District Court dismissed this admission as hearsay, (Appendix at A.29). However, it is plainly not hearsay, in that it was a statement offered against the Town of Hallie by the town's "agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship..." See Rule 801(d)(2)(D) of the Federal Rules of Evidence.

5The study is referenced by the Seventh Circuit in its opinion in the Appendix at A.12.

For all of the foregoing reasons, the petition for writ of certiorari should be granted and the matter set on for oral argument. In the alternative, certiorari should be granted, the judgment of the Seventh Circuit vacated, and the matter remanded for reconsideration in light of this Court's recent decisions in *Pap's* and *Nixon.*

Respectfully submitted,

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